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Alliance OF AUTOMOBILE MANUFACTURERS

August 26, 2002

The Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Dr. Runge:

RE: (1) Final Rule Regarding Reporting of Information and Documents About Potential Defects; Retention of Records That Could Indicate Defects (67 Fed. Reg. 45824, July 10, 2002) Docket No. NHTSA 2001-8677, Notice 3
(2) Request for Public Comment on Proposed Collection of Information (67 Fed. Reg. 42843, June 25, 2002) Docket No. NHTSA 2001-8677, Notice 2

The Alliance of Automobile Manufacturers (Alliance), whose members are BMW Group, DaimlerChrysler, Fiat, Ford Motor Company, General Motors, Isuzu, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, and Volkswagen, submits the following petition for reconsideration and request for clarification of certain issues raised by the final rule adopted in the above referenced notice. This final rule adopted regulations to implement the "early warning reporting requirements" of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act (P.L. 106-414). This also serves to comment on the agency's request for public comments on the recordkeeping and reporting burdens associated with the rule, as required by the Paperwork Reduction Act.

The Alliance wishes to note its general support for the overall approach taken in the final rule adopting "early warning" reporting requirements. The Alliance believes that the overall approach to the "early warning" system was generally responsive to the needs of the "early warning" system as described in the proposal and to the comments filed by the Alliance and its member companies on the proposed rule.

Nevertheless, there are some aspects of the final rule that warrant reconsideration and/or clarification, and this petition presents those issues for NHTSA's consideration. Several of these issues relate to the need for objective, clear definitions of what information is reportable. The Alliance has consistently, throughout this proceeding, emphasized the need for objective, clear definitions of what information is reportable, and the final rule goes a long way toward resolving issues that had been unclear in the earlier proposals. Not all of the issues have been resolved, however, and the final rule introduces some new ambiguities about the scope of the definition of "field report" that need clarification.

From the Alliance perspective, the issues divide into two categories: (1) those issues thought to raise substantive concerns and (2) those issues thought to be resolvable by technical corrections. The Alliance notes that the order in which these issues are presented does not necessarily indicate the order of importance of these issues. Moreover, the Alliance emphasizes that the issues identified as potentially resolvable by a "technical correction" are no less important than the other issues discussed in this petition, and resolution of those issues is just as necessary as resolution of the substantive issues.

I. ISSUES THAT RAISE SUBSTANTIVE CONCERNS

A. Field Reports

1. Exclusion of field reports prepared in anticipation of litigation. In response to the NPRM, the Alliance and several of its members expressed concern that the definition of "field report" should not include reports prepared in anticipation of litigation, because such reports are protected from disclosure under the "work product" doctrine. In response, NHTSA agreed that the definition of reportable "field reports" should not "inhibit[] the manufacturers' ability to consult with outside counsel." 67 Fed. Reg. at 45855. The Alliance appreciates that the final rule recognized the need for open consultation with counsel, by excluding from the reporting requirements any document "contained in a litigation file that was created after the date of the filing of the civil complaint that relates to the vehicle, component or system at issue in the litigation." The Alliance agrees with the intent of this provision.

Nevertheless, the Alliance submits that this exclusion, as drafted, is too narrow in light of well-established privilege law. The legal privilege applies, not only after litigation is officially commenced by the filing of a lawsuit, but also ***in anticipation of litigation*** – that is, after a claim is made, but prior to the filing of a lawsuit, or after the filing of a "notice" that a "claim" might be asserted. The preamble to the final rule says as much: "With respect to the issue of privilege, we recognized that a field report truly prepared in anticipation of litigation could be considered as work product, and thus ordinarily be exempt from production in litigation." 67 Fed. Reg. at 45855. To achieve the stated goal, the text of the rule itself must be consistent with the preamble, and with the existing law of privilege and not require a manufacturer to report any document prepared in anticipation of a particular litigation claim, regardless of whether a "civil complaint" has already been filed in connection with the incident. Such an exclusion would fulfill the goal of encouraging open consultation with counsel, without depriving NHTSA of any field report that is prepared for other than litigation purposes. Moreover, the Alliance notes that the work product doctrine and legal privileges are available both to outside counsel as well as in-house counsel. The Alliance presumes that NHTSA did not intend to differentiate between the work of an outside attorney and that of an in-house attorney.

To implement this change, the end of the definition of "field report" should be revised to read as follows: "... but does not include a document that was created in anticipation of litigation."

2. Exclusion of subsequent internal correspondence. In its comments to the NPRM, the Alliance asked for confirmation that internal company correspondence about a particular field incident captured in a "field report" is not reportable as another "field report." The specific comment filed by the Alliance is quoted here:

> "The definition of "field report" should also make clear that subsequent internal correspondence about the field incident is not reportable as another "field report." As currently written, subsequent communications about a field report would also be considered a field report, so potentially, one report could become many more, resulting in skewed data. For purposes of "early warning," NHTSA will already have the report of the initial incident from one of the other reportable categories. When NHTSA's Office of Defects Investigation sends Information Requests in connection with defect investigations, it routinely requests manufacturers to provide "field reports," and separately requests manufacturers to provide "studies, surveys and investigations" and "customer complaints" related to the alleged defect. At many companies, internal company correspondence generated subsequent to a field report falls into one of the latter categories of "studies, surveys and investigations" or "customer complaints," and is not itself a new "field report." NHTSA should clarify that point in the definition." Alliance comments to NPRM on Early Warning at Page 12.

The agency's response to this comment was to observe that "while 'internal correspondence' might not fit within the definition of 'field report,' there can be, and often will be, multiple field reports about a particular incident. The information contained in such subsequent reports can be very valuable in ascertaining whether a possible defect exists." 67 Fed. Reg at 45854. The Alliance respectfully suggests that this discussion did not, in fact, respond to the concern raised by the Alliance. The Alliance was not resisting the provision of subsequent new "field reports" about a particular incident, although the instances of "multiple field reports about a particular incident" are less common than NHTSA's response would imply. Rather, the Alliance was seeking clarification that subsequent ***internal communications*** about a field report undertaken in the ordinary course of business, which do not themselves involve dispatching employees/agents for further inspection or investigation of the underlying incident, do not constitute new, reportable "field reports" for early warning purposes.

As NHTSA noted in the Final Rule, "the definition of field report that we proposed was intended to capture the basic concept of field reports utilized by ODI for many years." 67 Fed. Reg. at 45855. The Alliance's understanding of that "basic concept" is that internal business correspondence referring to, or addressing the content of, a "field report" is not itself a new "field report" and has not been treated as such by Alliance members in responding to ODI inquiries over the years. The Alliance requests confirmation of this understanding.

3. In-Plant Inspection Records and Similar Documents. The Alliance believes that the definition of "field report" could be interpreted to require reporting of the records made during "end of line" quality inspections of new vehicles in manufacturing plants or at ports (for imported vehicles). The Alliance does not believe that NHTSA intended to include these documents as "field reports," because they will not assist the agency in identifying potential safety defects. By definition, these quality inspections are intended to catch, and correct, manufacturing errors before the vehicle leaves the custody and control of the manufacturer. Under Part 573 of the agency's regulations, defects that are caught and corrected before the vehicles "have been transported beyond the direct control of the manufacturer" are not reportable as "safety-related defects" under Part 573. See § 573.3(a). For the same reason, the records of in-plant inspections or similar records made of inspections at ports of entry should not be considered to be "field reports."

One way to accomplish this would be to add to the definition of field report another exclusion mirroring the language in 573.3, such as the following: "...and does not include a document regarding a vehicle or equipment that has not been transported beyond the direct control of the manufacturer." The Alliance notes that this proposed language does not compromise NHTSA's receipt of any "field reports" from executive or employee product evaluation fleets, because those vehicles are entered into service on public roads and therefore are no longer under the "direct control" of the manufacturer, even though they are ordinarily still owned by the manufacturer.

4. Definition of "fleet". In its comments, the Alliance noted the difficulties associated with NHTSA's proposed definition of "fleet," for purposes of the early warning rule. The Alliance noted:

> "NHTSA underestimated the difficulty in identifying whether a written complaint about a vehicle performance problem is from a "fleet." While some "fleets" are well-known (*e.g.*, Hertz Rent-A-Car), it is usually not obvious on the face of a written complaint from a customer or other person making the complaint whether that customer owns ten or more vehicles of the same make/model/model year. Most manufacturers keep their vehicle records by Vehicle Identification Number, and do not know on any systematic basis how many vehicles a customer owns, with the possible exception of large fleets, such as rental car fleets. It would be enormously burdensome, if not impossible, to require each manufacturer to check the ownership status of each customer who makes a written complaint about a "failure, malfunction, lack of durability or other performance problem of a motor vehicle" in order to determine whether that customer owns ten or more motor vehicles of the same make/model/model year." Alliance Comments to NPRM on Early Warning at Page 13.

In the final rule, NHTSA did not respond to this comment. The Alliance believes that NHTSA still underestimates the difficulty – indeed, practical impossibility of identifying whether a written complaint about a vehicle performance problem is from a "fleet" owner, as NHTSA has defined the term "fleet." The manufacturers simply do not know when a customer purchases more than ten of a particular make/model vehicle. As NHTSA has correctly recognized throughout this rulemaking proceeding, "the TREAD Act precludes NHTSA from requiring manufacturers to maintain or submit records respecting information not in their possession." 67 Fed. Reg. at 45852, citing 49 U.S.C. § 30166(m)(4)(B).

One good example of a "fleet" (under NHTSA's definition) that would not have been known to the vehicle manufacturer but for a serendipitous copy of a media report forwarded to a VW hobbyist who happens to also be a lawyer for VW is an exterminator company located in Arizona that happens to use decorated Volkswagen Beetles as its "theme" motor vehicle. The exterminator company owns more than ten Volkswagen Beetles, but VW did not know that the company owned more than ten Beetles, until the fact was publicized in a news article that was fortuitously shared with a VW lawyer. VW has confirmed that nothing in its records would have revealed that this company owned a "fleet" of Beetles. This example proves the difficulty and, indeed, the impossibility, of knowing when vehicle "fleets" have been created, merely because ten or more vehicles of the same make/model/model year combination are purchased by the same entity.

As the Alliance proposed in its comments, one appropriate surrogate for identifying those "fleets" whose technical reports are likely to have the value that NHTSA anticipates is to define "fleet" for this purpose as a customer owning ten or more vehicles of the same make/model/model year to whom a manufacturer has delegated the right to perform warranty repairs and to be compensated through the manufacturer's warranty administration system. The Alliance proposed such a definition in Appendix B of its comments to the NPRM, and renews that proposal here.

B. One-Time Historic Reports

The Alliance seeks reconsideration of the requirement to count and categorize historic field reports into the reporting categories established in the final rule. As explained in prior Alliance submissions to the "early warning" docket, the requirement to review and categorize historic field reports is substantial. Although NHTSA is correct that the burden estimate prepared for the docket at NHTSA's request included some time and costs estimated for preparing hard copies of field reports, the remaining burden of manually searching and coding historic field reports remains high and falls disproportionately on those Alliance members whose field reports are not already coded or retained in a text-searchable format. In addition, requiring Alliance members to search through historic files to locate any "goodwill" claims that were paid outside the warranty system or settlements of "breach of warranty" claims/lawsuits will require an investment of time that far outweighs the limited value this search of non-automated files will produce for the agency.

Now that the final rule has clarified that hard copies of historic field reports are not required to be submitted, the revised burden estimate for reviewing and coding the historic field reports is nevertheless substantial – conservatively over 43,000 hours. The Alliance submits that this burden is substantially higher than the value that NHTSA will gain from the historic field report and historic "goodwill"/breach of warranty claim settlement counts. The historic information will be obsolete within several months, because the early warning system will have a new field report "baseline" from the first early warning reports. Given the temporary nature and limited value of this historic information, it is unlikely that this reporting burden provides sufficient "practical utility" for the agency to satisfy the requirements of the Paperwork Reduction Act.

Moreover, NHTSA's decision to include as "warranty claims" those "goodwill" claims that are handled outside the warranty system substantially affects the burden of the one-time historic reporting requirement, as does the requirement to count as "warranty claims" any settled "breach of warranty" lawsuits. While the Alliance accepts that definition prospectively, it complicates and enlarges the burden of searching old files for the one-time historic report. "Goodwill" claims handled outside the warranty system are, by definition, ***not in*** the already-coded warranty database. Likewise, settled claims for breach of warranty are not in the already-coded warranty database. Both types of records will have to be searched manually, at a burden of, conservatively, over 14,900 hours. Especially because the number of "goodwill" claims paid outside of the warranty system, and settlements of "breach of warranty" claims will be miniscule compared with the numbers of automated warranty claims that will be submitted, this burden is particularly unjustified.

The Alliance reiterates that providing historic warranty claim counts is feasible, when "warranty claim" is interpreted (just for this historic reporting purpose) to be limited to information in the manufacturer's warranty database, but that including historic "goodwill" claims outside the warranty system, historic settlements of breach of warranty claims and historic field reports is unreasonably burdensome.

C. Exclusion of Certain Non-Physical Injuries

In its comments to the NPRM, the Alliance proposed that the early warning reports of injuries should not include claims or notices about "emotional" and other non-physical injury claims, because those are not ordinarily the type of injury with which NHTSA is concerned under the Vehicle Safety Act. NHTSA declined the Alliance's proposal in the final rule, noting that a claim for emotional distress following (for example) an inadvertent airbag deployment or a loss of vehicle control would be of interest to the agency.

The Alliance is not seeking reconsideration of this decision in general; however, the Alliance may not have been clear in its original proposal, in which the early warning reports would exclude those "wrongful death," "loss of services," or "loss of consortium" injury claims that are derivative of death/injury claims that are already being reported to NHTSA under the early warning system. Alliance members estimate that "loss of consortium," "loss of services," or similar "emotional" injury claims are routinely filed with nearly every fatality/serious injury claim, by the spouse or family of the injured person, ***and is likely to more than double*** the claims of "injury" that are reportable under the early warning system, as currently defined. There are different rules in every jurisdiction, but many jurisdictions recognize the *separate* "injury" claims of spouses, children, parents, siblings and assorted other relatives in addition to the damage available to an injured person or the estate of a decedent. Thus, in some jurisdictions, not only will the estate of a decedent have a claim for injury, but a decedent's spouse, children, guardians ad litem and executors of estates may also have individual claims arising out of a the death. Some jurisdictions likewise recognize separate, multiple claims arising out of a single injury. Under the early warning system, NHTSA will always be informed of the underlying fatality/injury claim or notice. But, if NHTSA requires the industry to report separately on the derivative claims of injury due to "loss of consortium" or other emotional injury suffered by someone other than the person physically injured in the vehicle involved in the collision, these derivative injury claims will distort the real injury incident rate for that make/model vehicle.

The Alliance notes that its members have typically not counted derivative injury claims as separate injuries when responding to ODI investigations, and also notes that ODI typically does not add them to the count of injuries in its opening and closing resumes of defect investigations, even though ODI typically receives copies of the claims. The standard practice has been to count the underlying injury or fatality occurrence, and not also to add derivative damage claims as separate injuries.

The Alliance requests that NHTSA exclude from the definition of "claim" and "notice" any injury claim that is derivative of a fatality/injury claim that is separately reportable under the early warning system.

D. Cover Letter For Monthly Submissions of Communications

In its comments to the NPRM, the Alliance strongly opposed the proposal to require a cover letter and index for each monthly submission of documents about customer satisfaction campaigns and other activities. The Alliance pointed out that this new proposal would impose a substantial burden on those manufacturers that have already established electronic submission systems to provide such information to NHTSA simultaneously with providing it to dealers. Requiring those manufacturers to create a monthly "cross-index" of previously submitted bulletins is an unreasonable burden, and may actually slow the process of providing the required information, which is contrary to the intent of the "early warning" program. Indeed, if this requirement is kept, manufacturers may require more than five days – perhaps as much as thirty days – to prepare and file the required "cross-index" of already-filed bulletins and other dealer communications. NHTSA never responded to this comment from the Alliance, and merely repeated the requirement for a cover letter in the final rule. NHTSA also did not estimate any burden associated with this new requirement in connection with the final rule in the Paperwork Reduction Act clearance form it provided to OMB. While the burden will vary from company to company, and does not rise to the magnitude of providing historic field reports, for example, it is nevertheless an unnecessary burden, because it is redundant of the submissions themselves which NHTSA can log and index as it receives them, if it needs such a document.

The Alliance reiterates its concerns here, and requests NHTSA to relieve manufacturers from the counterproductive requirement of creating a monthly document that amounts to a "cross-index" of previously submitted bulletins and other notices regarding communications with dealers and others. No such cover letter is required now, and NHTSA has not demonstrated a need to impose this new obligation.

II. Issues Resolvable by Technical Corrections

A. Reporting Classification of "Fire"

NHTSA's rule requires reporting as a "fire" any event involving "combustion or burning of any material in a vehicle as evidenced by, but not limited to, flame smoke, sparks, or smoldering." The Alliance objected to the proposed definition, noting that

> "Moreover, NHTSA's definition would include complaints of smoke and smoldering, which the Alliance does not believe need to be tracked for early warning purposes. If NHTSA nevertheless believes that these types of incidents should be reported, then there must be separate categories for these events, to avoid unduly alarming the public about the number of vehicle "fires" reported in a particular make/model and to permit NHTSA to prioritize its resources between genuine fire reports and exhaust "smoke" reports (which may be nothing more than an emissions issue).

The agency did not respond directly to this Alliance comment. Rather, the agency decided to require events to be provided to the agency, in accordance with the proposed definition. The Alliance petitions for reconsideration of this decision insofar as the category of reportable information remains identified as "fire."

The Alliance accepts the agency's decision to require reports of all events that meet the definition established by the agency. However, against the possibility that any of these reports should be made public in connection with a specific defect investigation, it is unfair and unreasonable, and potentially misleading and confusing to the public to categorize the reports as "fire" reports when they may involve nothing more than reports of exhaust smoke or smoldering.

Given that NHTSA has retained its definition of incidents for which reporting is required, the Alliance respectfully requests that NHTSA change the title of the reporting category in the rule and on the reporting template to reflect the larger incident pool that will be required to be reported under this category, to avoid unduly alarming the public, in the event that the reports are made public in connection with a specific defect investigation. The category could be renamed "flame, smoke, sparks or smoldering" complaints, or the acronym of this category ("FSSS") or some other name that is broader than the category of "fire." It is unfairly disparaging to the product, and unduly alarming and misleading to the public, to limit the name of this category to "fire."

B. Recordkeeping Duration for Information Supporting the Historic Reports

In the final rule, NHTSA made clear that it was not requiring recordkeeping of documents related to the early warning rule for longer than five years. 67 Fed. Reg. at 45868. Yet, the rule requiring recordkeeping for five years of "all the underlying records on which the information reported under part 579 of this chapter is based" has the (apparently unintended) effect of requiring manufacturers to retain records for more than five years when the "information reported under part 579" is the historic, one-time report. Since this required report includes information that will be up to three years old at the time of the first historic report, the effect of this new rule is to require retention of information for eight calendar years, a burden that was not identified or estimated in connection with the adoption of the final rule or in the Paperwork Reduction Act clearance request submitted by the agency to OMB.

The Alliance respectfully suggests that NHTSA could achieve its goals, without imposing an unintended record retention burden, by requiring manufacturers to retain the supporting information for each historic report for a period of time equal to five years from the beginning of the reporting quarter. Thus, for example, the records used to prepare the historic report for the third quarter of 2002 would be retained until the third quarter of 2007 – five years after their creation.

Such a record retention rule would respect the agency's requirements to have sufficient time to inquire about the adequacy of a manufacturer's reporting, without imposing undue burdens on the reporting manufacturers.

C. Exclusion of Documents Related to Emissions Recalls

The definition of "warranty claim" properly excludes "work performed to remedy a safety-related defect or noncompliance reported to NHTSA under part 573 of this chapter, or in connection with an emissions-related recall under the Clean Air Act." The Alliance requests NHTSA to amend this definition to include work performed in connection with any emissions-

related recall under state emissions laws, such as those done in connection with an emissions-related recall under California Air Resources Board regulations. The Alliance believes that such an exclusion is consistent with the exclusion for federal emissions recall work, and would help avoid diluting the warranty claim reports with claims that are not likely to suggest the presence of a safety defect.

D. Production Numbers

At the proposal stage, the Alliance noted that the NHTSA proposal appeared to require world-wide production information, when in all likelihood, the agency wanted production figures for units destined for sale in the United States. The Alliance assumes that NHTSA intended to obtain the number of vehicles manufactured for sale in the United States or imported for sale in the United States, not world-wide production. Otherwise, NHTSA will, in some cases, be comparing U.S. trend indicator data against a world-wide production number. This will skew the intended normalization. This should be clarified in the final rule. With respect to fatalities, which will be reported world-wide, NHTSA will know which fatalities were domestic to the United States, and can normalize that figure to production numbers. If NHTSA requires world-wide production of a particular model to normalize fatality data for that model, it can request that information from the manufacturer on a case-by-case basis.

E. Multiple "Substantially Similar" Platforms. The Alliance seeks clarification of how it should handle the reporting of a foreign fatality in a vehicle that has more than one "substantially similar" platform in the United States. It would seem redundant and confusing to report the single fatality on each of the quarterly reports of all of the "substantially similar" U.S. platforms, and would appear as if there had been more foreign fatalities than there actually were. The Alliance proposes that a manufacturer should be permitted to choose one of the "substantially similar" platforms and report the foreign fatality on that platform's quarterly report.

F. Property Damage Claims with Associated Fatalities/Injuries. In the NPRM, the agency stated: "If the incident that allegedly led to the property damage also resulted in a death or injury, the manufacturer would only report the incident as one involving a death or injury, and it would not be required to report the incident under the property damage requirement. Otherwise, there could be a misleading "double count." 66 Fed. Reg. at 45846.

This clarification was not repeated in the final rule. The Alliance seeks NHTSA's confirmation that the policy stated in the NPRM is still correct, and that property damage claims are not separately reportable if the same incident resulted in a reported death or injury.

G. Default Rule for Reports Due on Weekends or Federal Holidays

The Alliance suggests that the rule should explicitly provide for the possibility that an early warning report could fall due on a Saturday, Sunday or Federal Holiday. Under such circumstances, the Alliance suggests that the rule should provide that the due date would be the first business day following the weekend or Federal holiday. This would be consistent with NHTSA's stated approach in the preamble to the final rule recognizing that November 30, 2003 falls on a Sunday and specifying that the report is due on the Monday, December 1, 2003 (see 67 Fed. Reg. at 45684).

F. Definitions that Need Clarification

The Alliance has identified some definitions of reportable categories that require further clarification.

1. Code 03 (service brake). Since NHTSA decided to continue to require separate reporting of issues involving service brakes and parking brakes, the definition of "service brake" is problematic because it cross-references FMVSS 105 and 135, both of which contain references to parking mechanisms or parking brakes:

- the mention of parking mechanism in 571.105 S4
- the mention of parking brake in 571.105 S5.2 – 5.2.3, S7.7 – 7.7.4, and S7.19
- the mention of parking brake in 571.135 S5.2, and S7.12.2 – 7.12.3

This could be solved by revising the definition as follows (new material in italics): **Service Brake System** means all components of the service braking system of a motor vehicle intended for the transfer of braking application force from the operator to the wheels of a vehicle, including the foundation braking system, such as the brake pedal, master cylinder, fluid lines and hoses, braking assist components, brake calipers, wheel cylinders, brake discs, brake drums, brake pads, brake shoes, and other related equipment installed in a motor vehicle in order to comply with FMVSS Nos. 105, 121, 122, or 135 *(with the exception of any reference in FMVSS 105 or 135 to parking mechanism or parking brake)*. This term also includes systems and devices for automatic control of the brake system such as antilock braking, traction control, stability control, and enhanced braking. The term includes all associated switches, control units, connective elements (such as wiring harnesses, hoses, piping, etc.), and mounting elements (such as brackets, fasteners, etc.).

2. Code 22 (seats). The problem with the definition as drafted is that it refers to S9 of FMVSS 209, which does not have an S9. Moreover, components of a motor vehicle installed in compliance with FMVSS 209 are already covered by the definition of "seat belts." Thus, the reference to S9 of FMVSS 209 should be removed.

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The Alliance appreciates having this opportunity to participate in this rulemaking proceeding and to provide comments on the recordkeeping and reporting burdens associated with this final rule. Please contact us if we can provide any additional information.

Sincerely,

Robert Strassburger
Vice President, Safety and Harmonization
Alliance of Automobile Manufacturers

cc: Jacqueline Glassman, Esq., Chief Counsel

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